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NO: 04-6432

IN THE
SUPREME COURT OF THE UNITED STATES

AURELIO O. GONZALEZ,

Petitioner,

v.

JAMES V. CROSBY, JR.
Secretary for the Department of Corrections,

Respondent.

On Writ of Certiorari
to the Court of Appeals for the Eleventh Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED BY *AMICUS CURIAE*

1. Did the Court of Appeals' interpretation of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") effect an improper implied repeal of Rule 60 of the Federal Rules of Civil Procedure?

2. Did the Court of Appeals' interpretation of AEDPA raise grave constitutional concerns?

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BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

INTERESTS OF *AMICI CURIAE*

The NACDL, a nonprofit corporation, is the only national bar association working in the interest of public and private criminal defense attorneys and their clients. NACDL was founded in 1958 to ensure justice and due process for persons accused of crimes; foster the integrity, independence and expertise of the criminal defense profession; and promote the proper and fair administration of justice.[1] NACDL has 10,000 members nationwide -- joined by 80 state and local affiliate organizations with 28,000 members -- including private criminal defense lawyers, public defenders and law professors committed to preserving fairness within America's criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization with full representation in its House of Delegates. In this case, the NACDL is concerned that adoption of the Eleventh Circuit's holding will deprive hundreds of federal habeas petitioners any ability to obtain a valid review of the merits of their claims challenging the legality of their detentions.

SUMMARY OF THE ARGUMENT

In finding that restrictions on second or successive habeas applications established by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. §2244, preclude use of Rule 60(b) of the Federal Rules of Civil Procedure to reopen a final judgment rendered by a federal district court, the Eleventh Circuit held, in effect, that AEDPA worked an implied repeal of Rule 60(b). It is well-settled that repeals by implication are disfavored. This Court

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[1] No counsel for any party has authored this brief in whole or in part, and no person or entity, other than NACDL, made any monetary contribution to its preparation or submission. *See* Rule 37.6, Sup. Ct. Rules. The parties have consented to the filing of this brief, and letters of consent have been lodged with the Clerk of the Court. Rule 37.3(a).

will therefore not find an existing statute or codified rule of civil procedure to be silently overruled by a new statute, unless the statutes are in irreconcilable conflict. Moreover, this Court has an obligation to construe both provisions to avoid conflict. The Court also must adopt the interpretation of AEDPA that avoids grave constitutional concerns.

The Court should not find that AEDPA impliedly repealed Rule 60(b) because no irreconcilable conflict exists. The judicially created limitations on successive and abusive habeas applications, established prior to AEDPA and codified in stricter form, long have co-existed with motions to vacate judgments. Successive habeas petitions and Rule 60(b) motions are distinct applications to the court, which serve different purposes, raise different issues, seek different relief, and thus do not overlap. A second or successive petition is one filed after an initial petition was resolved on the merits, asserting claims of unconstitutionality in a petitioner's state conviction, sentence, or detention. A Rule 60(b) motion, on the other hand, seeks to reopen a judgment, not simply to revisit the merits, but on the ground that a defect in the federal habeas proceeding deprives that judgment of legitimacy or integrity. Further, Rule 60(b) is the codification of the trial court's traditional equitable power to control its judgments, a power this Court should be especially reluctant to hold was abrogated, absent express language to that effect. Finally, the Eleventh Circuit's holding that AEDPA impliedly repealed Rule 60(b) in the habeas context raises grave constitutional concerns over suspension of the writ of habeas corpus and violation of due process of law.

ARGUMENT

I.
AEDPA'S LIMITATIONS ON SUCCESSIVE HABEAS APPLICATIONS DID NOT REPEAL RULE 60(b).

It is a cardinal rule of statutory construction that repeals by implication are not favored. *See Branch v. Smith*,

538 U.S. 254, 273 (2003); *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 442 (1987); *TVA v. Hill*, 437 U.S. 153, 189 (1978); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976); *Rail Act Cases*, 419 U.S. 102, 133 (1974). Where there is total silence, as in this case, finding repeal is even more dangerous. "Inferring repeal from legislative silence is hazardous at best, and error seems overwhelmingly likely in the notion" that a statute wordlessly redefined a pre-existing law. *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 132 (2003). There are two narrowly drawn exceptions to the prohibition against repeals by implication: (1) Where provisions in the two acts are in irreconcilable conflict, such that the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute. *See Posadas v. National City Bank of N.Y.*, 296 U.S. 497, 503 (1936).

The interpretive canon that implied repeals are disfavored applies not only to a purported repeal of a pre-existing statute but also to a purported to repeal of a rule of procedure. *See Califano v. Yamasaki*, 442 U.S. 682, 699 (1979) (stating that the Court will apply Federal Rules of Civil Procedure to all civil matters absent "a direct expression by Congress"); *Callihan v. Schneider*, 178 F.3d 800, 802 (6th Cir. 1999) (stating that "restriction on Congress's power to amend the federal rules is the general disfavor with which courts view implicit amendments or repeals"). Given that the habeas provisions of AEDPA do not cover the entire subject of relief from prior judgments, such that they can be said to constitute a substitute for Rule 60(b), the important question is whether there is an irreconcilable conflict between § 2244(b)(1) and Rule 60(b). To imply repeal, there must be a "positive repugnancy" between the statutes that cannot be reconciled. *Rail Act Cases*, 419 U.S. at 134.[2]

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[2] This approach mirrors the dictates of Rule 11 of the Federal Rules Governing 28 U.S.C. § 2254 Cases, which provides, "The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with

A.
AEDPA did not repeal Rule 60(b) by implication because there is no irreconcilable conflict between AEDPA and Rule 60(b)

Rule 60(b) is a codified rule of civil procedure that "vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *Klapprott v. United States*, 335 U.S. 601, 614-15 (1949). Rule 60(b) is the product of the Court's effort to codify and expand pre-existing common law writs to make courts' power to reopen their judgments "complete." *See* Fed. R. Civ. P. 60 advisory committee's note to 1948 Amendment; *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 233-34 (1995). This Court enacted Rule 60(b) pursuant to the delegation of the Rules Enabling Act, 28 U.S.C. § 2072(a), and Congress is deemed to have adopted the rule by declining to disapprove of it, pursuant to 28 U.S.C. § 2074(a). *See Davis v. United States*, 411 U.S. 233, 242 (1973).

In the instant case, the issue is whether certain provisions of AEDPA affect a repeal of Rule 60(b) in the federal habeas context. Section 2244(b)(1) states, "a claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." 28 U.S.C. § 2244(b)(1).[3] The plain language neither references Rule 60(b) itself nor otherwise evidences congressional consideration of district courts' power to grant motions to vacate, reconsider, or grant

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these rules, may be applied, when appropriate, to petitions filed under these rules." *See Browder v. Director*, 434 U.S. 257, 270 (1978) (holding Rules 52(b) & 59 governing time limits applied to petitioner's motion to reconsider habeas judgment because of "the settled conformity of habeas corpus and other civil proceedings with respect to time limits on post judgment relief"); *cf. Harris v. Nelson*, 394 U.S. 286, 289-90 (1969) (finding broad discovery provisions of Rule 33 inapplicable to habeas proceedings because they were innovative and because of the historical lack of such discovery practice in habeas proceedings).

[3] Petitions that raise new claims are subject to the restrictions in § 2244(b)(2) and may be filed in certain circumstances.

relief from a judgment. Consequently, § 2244(b)(1) is not a direct repeal of 60(b), and the only way to construe § 2244(b)(1) as affecting Rule 60(b) is to find a repeal by implication.

This Court repeatedly has shown an unwillingness to find irreconcilable conflict and imply repeal, even in cases involving more specific statutory language and history than the legislative silence present in this case. *See, e.g., Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 469-70 (1982) (finding provisions of Title VII allowing for federal suit after "final findings [of] State proceedings" did not repeal 28 U.S.C. § 1738, which requires federal courts to give preclusive effect to state court judgments); *Allen v. McCurry*, 449 U.S. 90, 100 (1980) (holding that 42 U.S.C. § 1983, did not overrule doctrine of preclusion, codified § 1738, despite legislative history showing that Congress was concerned with deficient state judgments); *Radzanower*, 426 U.S. at 155 (holding that venue provision of Securities Exchange Act did not repeal or amend venue provision of the National Bank Act); *Rail Act Cases*, 419 U.S. at 130 (holding that provisions of Rail Act limiting government payouts to rail companies did not repeal Tucker Act provisions allowing for takings suits against government); *Silver v. New York Stock Exch.*, 373 U.S. 341, 362 (1963) (holding that Securities Exchange Act scheme of self-regulation did not repeal Sherman antitrust laws).

The plain language of AEDPA does not indicate an irreconcilable conflict with Rule 60(b). AEDPA's silence on Rule 60(b) is even more compelling in light of the historical use of the Rule to challenge flawed habeas judgments. *See Browder v. Director*, 434 U.S. 257, 263 & n.8 (1978) (assuming availability of Rule 60(b) relief from habeas judgments); *Id.* at 273-74 (Blackmun, J., concurring); *Pitchess v. Davis*, 421 U.S. 482, 490 (1975) (reading Rule 60 and 28 U.S.C. § 2254 together); *Cornell v. Nix*, 119 F.3d 1329, 1332-33 (8th Cir. 1997); *Hunt v. Nuth*, 57 F.3d 1327, 1339-40 (4th Cir. 1995); *Mohammed v. Sullivan*, 866 F.2d 258, 260 (8th Cir. 1989); *Ritter v. Smith*, 811 F.2d 1398, 1401 (11th Cir. 1987); *Matarese v. LeFevre*, 801 F.2d 98, 106-07 (2d Cir. 1986). Congress is presumed to legislate

against a background of existing law, scholarship, and history. *National Archives and Records Admin. v. Favish*, 124 S. Ct. 1570, 1579 (2004). In addition, the legislative history of AEDPA, although admittedly sparse in all contexts, does not indicate that § 2244(b)(1) was intended to eclipse Rule 60(b).

Some lower courts have held that there is an irreconcilable conflict between AEDPA and Rule 60(b) because § 2244(b)(1)'s ban on second or successive same-claim applications broadly prohibits a petitioner from filing anything in district court after his initial habeas petition has been dismissed. *See, e.g., Wainwright v. Norris*, 958 F. Supp. 426, 431 (E.D. Ark. 1996) (dismissing under § 2244(b)(1) a claim that was not "successive" because it was a "second" filing in the district court). This Court, however, rejected such an interpretation in *Stewart v. Martinez-Villareal*, 523 U.S. 637, 645 (1998), holding that a second same-claim habeas petition filed after the district court had dismissed the initial petition[4] as premature was not a successive application within the meaning of § 2244(b). Rejecting the state's argument that the petition was successive because it followed a dismissed petition, this Court observed, "This may have been the second time that respondent had asked the federal courts to provide relief on his *Ford* claim, but this does not mean that there were two separate applications, the second of which was necessarily subject to § 2244(b)." *Id.* at 643. The Court relied on pre-AEDPA decisional law construing the meaning of "successive application" to conclude that a same-claim petition filed by a prisoner whose first federal habeas petition had been dismissed for technical procedural reasons, is simply not a successive application. *Id.* at 644-45.

Thus, this Court has refused to endorse the conclusion that § 2244(b)(1) precludes the filing of any motion in the district court after resolution of the initial habeas petition. The question then becomes whether §

[4] Defendant had asserted that he was incompetent to be executed and requested relief pursuant to *Ford v. Wainwright*, 477 U.S. 399 (1986). *Martinez-Villareal*, 523 U.S. at 640.

2244(b)(1), while not intended to prevent re-filing all claims, nonetheless was intended to preclude Rule 60(b) motions. An understanding of the evolution of the meaning of "successive application" in habeas corpus jurisprudence leads inexorably to the conclusion that Congress did not intend to prevent Rule 60(b) relief from erroneous habeas judgments.

This Court has stated that the meaning of "successive application," as used in AEDPA, can be determined by reference to pre-AEDPA law. *See Slack v. McDaniel*, 529 U.S. 473, 483 (2000) ("AEDPA's present provisions . . . incorporate earlier habeas corpus principles."); *Felker v. Turpin*, 518 U.S. 651, 664 (1996) (stating that AEDPA "codifies some of the preexisting limits on successive petitions"). "The phrase 'second or successive petition' is a term of art given substance in [the Court's] prior habeas corpus cases." *Slack*, 529 U.S. at 476.[5]

Historically, habeas petitioners possessed broad ability to file repetitious petitions and claims. Habeas corpus jurisprudence evolved on a backdrop of filing permissiveness because "the government must always be accountable to the judiciary for a man's imprisonment." *Fay v. Noia*, 372 U.S. 391, 402 (1963). The Court recognized that "conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review." *Id.* at 424; *see also Stone v. Powell*, 428 U.S. 465, 519 (1976). Eventually, however, this Court identified three types of claims excepted from the permissive filing standards: "(a) *successive claims* that raise grounds identical to grounds heard and decided on the merits in a previous petition; (b) new claims, not previously raised which constitute an *abuse-of-the-writ* ; [and] (c) *procedurally defaulted claims* in which the petitioner failed to follow applicable state procedural rules in raising the claims."

[5] There is no definition of "second or successive application" in the legislation or legislative history of AEDPA.

Sawyer v. Whitley, 505 U.S. 333, 338 (1992) (emphasis in original, citations omitted).

Each of these categories stood as distinct exceptions to traditionally liberal habeas filing. Defendants who had defaulted in state court, absent a showing of cause and prejudice, were precluded from federal habeas relief because of concerns over waiver and state comity. *See Fay*, 372 U.S. at 439 (holding that certain procedural defaults amounted to "an intentional relinquishment or abandonment of a known right or privilege") (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)); *Murray v. Carrier*, 477 U.S. 478, 487 (1986) (holding that default "exacts an extra charge by undercutting the State's ability to enforce its procedural rules") (quoting *Engle v. Isaac*, 456 U.S. 107, 129 (1982)). Similarly, petitioners who raised previously available new claims in a second habeas petition, known as abuse-of-the-writ, were not entitled to a review on the merits. This Court emphasized the concept of waiver to justify barring such litigants from obtaining review on the merits of their new claims. *See Sanders v. United States*, 373 U.S. 1, 17 (1963) (relying on "the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks"). Thus, "both the abuse-of-the-writ doctrine and . . . procedural default jurisprudence concentrate on a petitioner's acts to determine whether he has a legitimate excuse for failing to raise a claim at the appropriate time." *McCleskey v. Zant*, 499 U.S. 467, 490 (1991).

The abuse-of-the-writ doctrine, codified by AEDPA in § 2244(b)(2), and procedural default rules, survive today. *See Dretke v. Haley*, 124 S. Ct. 1847, 1851-52 (2004) (confirming that a petitioner in procedural default is permitted habeas review only upon a showing of cause and prejudice). These doctrines rest on the notion that a petitioner's fault, which poses a cost to the state and society, deprives that petitioner of his very important right to habeas merits review. This Court has contrasted such petitioners with those who file petitions in a proper manner. Recognizing the cost of continued habeas litigation, the Court nonetheless observed:

> The federal writ of habeas corpus overrides all these considerations, essential as they are to the rule of law, when a petitioner raises a meritorious constitutional claim in a proper manner in a habeas petition. Our procedural default jurisprudence and abuse-of-the-writ jurisprudence help define this dimension of procedural regularity. Both doctrines impose on petitioners a burden of reasonable compliance with procedures designed to discourage baseless claims and to keep the system open for valid ones.

McCleskey, 499 U.S. at 493.

In contrast to abuse-of-the-writ and procedural default rules, which relieve a federal court of the obligation to conduct a merits review, the ban on successive petitions does not relieve a federal court of its initial duty to conduct a merits review, but rather stands for the principle that federal habeas litigants are not necessarily entitled to multiple merits reviews. In *Sanders*, 373 U.S. at 15, this Court defined a "successive" application, as arising when "(1) the same ground presented in the subsequent application was determined adversely to the applicant . . . and (2) the prior determination was *on the merits.*" (emphasis added). *See also Kuhlmann v. Wilson*, 477 U.S. 436, 451 (1986) ("It is clear that Congress intended for district courts, as a general rule, to give preclusive effect to a judgment denying *on the merits* a habeas petition alleging grounds identical in substance to those raised in the subsequent petition.") (emphasis added); *Wong Doo v. United States*, 265 U.S. 239, 241 (1924); *Salinger v. Loisel*, 265 U.S. 224, 232 (1924). Post-AEDPA, this Court has continued to interpret "successive petition" as one filed after a previous resolution on the merits. *See Slack*, 529 U.S. at 485-86 ("A habeas petition filed in the district court after an initial habeas petition was *unadjudicated on its merits* . . . is not a second or successive petition.") (emphasis added);[6] *Martinez-*

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[6] Although Slack had commenced his habeas petition before the passage of AEDPA, the Court explicitly stated, "[W]e do not suggest the

Villareal, 523 U.S. at 645 (holding that a petition is not successive when "the habeas petitioner [did] not receive an adjudication of his claim" in the first petition).

Consequently, a careful analysis of the evolution of habeas filing restrictions reveals several important principles. The most important is the enduring concept that a habeas petitioner is entitled to at least one valid review on the merits of his challenge to the legality of his detention. *See Woodford v. Garceau*, 538 U.S. 202, 207 (2003) (holding that the essence of a claim for habeas relief is a request for review on the merits); *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996) (stating that dismissal of first habeas denies petitioners protection of the Writ). The evolving restrictions on habeas litigation carved out limited circumstances in which a petitioner could be denied merits review, namely unexcused procedural default and abuse-of-the-writ. *See Sawyer*, 505 U.S. at 338. And after the first merits review of a petitioner's claims, the petitioner was not necessarily entitled to duplicative merits reviews. *See Kuhlmann*, 477 U.S. at 451.

Given this evolution, it is clear that a ban on "successive applications" is not meant to disallow Rule 60(b) motions. A successive application is a petition, filed after a valid merits review, which seeks to relitigate the merits of petitioner's substantive claims challenging his detention. A Rule 60(b) movant does not seek to relitigate the merits of a claim, but rather asserts that he never received a valid merits review, either because the district judge, through error, refused to consider the merits, as in Gonzalez's case, or because the decision on the merits lacked integrity. *See Abdur'Rahman v. Bell*, 537 U.S. 88, 95-96 (2002) (Stevens, J., dissenting from dismissal of writ of certiorari) ("A Rule 60(b) motion is designed to cure procedural violations in an earlier proceeding—here, a habeas proceeding—that raise questions about that proceeding's integrity.") (quoting *Mobley v. Head*, 306 F.3d 1096, 1101 (11th Cir. 2003) (Tjoflat, J., dissenting) (vacated panel opinion)). A Rule

definition of second or successive would be different under AEDPA." *Slack*, 529 U.S. at 486.

60(b) motion contests the integrity or etiology of the district court's final judgment; it does not revisit constitutional issues already resolved on the merits. *See Abdur'Rahman*, 392 F.3d at 179; *Rodriguez v. Mitchell*, 252 F.3d 191, 199 (2d Cir. 2001); *Rodwell v. Pepe*, 324 F.3d 66, 71 (1st Cir. 2003). Consequently, permitting 60(b) movants the chance to obtain a true first merits review is completely consistent with § 2244(b)(1)'s ban on "successive applications," which seek to prevent duplicative merits reviews.

Moreover, Rule 60(b) movants are not similarly situated to the narrow class of habeas petitioners traditionally disallowed relief. The only petitioners not entitled to a merits review are those who, through their own unexcused behavior, have defaulted or failed to raise available claims. *McCleskey*, 499 U.S. at 490. By contrast, Rule 60(b) movants have abided by required procedures, but were unable to obtain a true merits review, not because of their unexcused culpable behavior, but rather because of some extraordinary circumstance. *See Liljeberg v. Health Serv. Acquisition Corp.*, 486 U.S. 847, 863-64 (1988) (holding that Rule 60(b) applies in extraordinary circumstances).[7] Thus, in banning "successive applications," Congress did not mean to preclude faultless petitioners from obtaining relief from grossly unjust habeas judgments. *See United States v. Beggerly*, 524 U.S. 38, 46 (1998) (holding that Rule 60(b) is meant to remedy gross injustices).

Given that there is no conflict indicated by the plain language, legislative history, or historical underpinnings of AEDPA, the court below relied on a characterization of the statute's broad purposes to justify its conclusion that § 2244(b) conflicts with Rule 60(b). *Gonzalez*, 366 F.3d at

[7] In addition, Rule 60(b) review does not implicate state comity concerns in the same manner as review of procedurally defaulted claims. Rule 60(b) challenges the federal district court's review as tainted by extraordinary circumstances, but in no way affects or seeks to supplant state procedural rules. The concern that allowing petitioners who have procedurally defaulted to obtain habeas review will encourage defendants not to comply with state procedures has no application to the 60(b) movant.

1269-70. The court sought to derive specific congressional intent from its own conclusion that "[t]he central purpose behind the AEDPA was to ensure greater finality of state and federal court judgments in criminal cases." *Id.* at 1269. This Court has, however, specifically rejected the notion that a court can rely on its characterization of a statute's broad objective to find a specific congressional directive. *See Rodriguez v. United States*, 480 U.S. 522, 535-36 (1987) (holding that lower court "impermissibly" relied on "its understanding of the broad purposes of" a statute to imply a repeal); *United States v. United Cont'l Tuna Corp.*, 425 U.S. 164, 169 (1976) (holding that the court "would normally expect some expression by Congress" that a repeal is intended); *Rail Act Cases*, 419 U.S. at 134 (stating that "it is reasonable for a court to insist on the legislature's using language showing that it has made a considered determination to that end") (quoting lower court opinion).

In addition, the broad purpose of AEDPA does not support the court of appeals' conclusion that Rule 60 is inconsistent with AEDPA, given the evolution of res judicata rules in habeas corpus jurisprudence. Res judicata is the principle that "a final judgment on the merits bars further claims by parties or their privies on the same cause of action." *United States v. Mendoza*, 464 U.S. 154, 159 n.3 (1984); *see also Montana v. United States*, 440 US 147, 153 (1979); *Parklane Hosiery v. Shore*, 439 U.S. 322, 326 n.5 (1979). The purpose of the rule is manifold. The Court has explained that "preclud[ing] parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana*, 440 U.S. at 153-54.

"At common law, res judicata did not attach to a court's denial of habeas relief." *McCleskey*, 499 U.S. at 479; *see also Sanders*, 373 U.S. at 7 (stating that the inapplicability of res judicata stems "from the earliest days of habeas corpus jurisdiction"). As habeas relief expanded and courts of appeals obtained jurisdiction, this Court began

to restrict seriatim filing of same-claim habeas petitions by permitting district courts, in certain circumstances, to dismiss successive petitions. *See Wong Doo*, 265 U.S. at 241. Prior to AEDPA, the rule governing dismissal of successive petitions was that district courts should dismiss successive petitions unless the "ends of justice" required a duplicative review. *Kuhlmann*, 477 U.S. at 451. This rule sought to balance "Congress' intent to give finality to federal habeas judgments with the historic function of habeas corpus to provide relief from unjust incarceration." *Id.* at 451-52.[8]

AEDPA amended § 2244(b) to direct that successive same-claim habeas petitions "shall" be dismissed, without exception. This Court has described the restrictions on successive filing as a "modified res judicata rule," *Felker*, 518 U.S. at 664, leading some lower courts to conclude that, even after AEDPA, res judicata principles remain inapplicable in habeas proceedings. *See Muniz v. United States*, 236 F.3d 122, 126 (2d Cir. 2001) (holding that "AEDPA did not abrogate the well-settled traditional rule" that res judicata does not apply in habeas proceeding). Even assuming, *arguendo*, that AEDPA was meant to import res judicata into habeas litigation to the same extent as in ordinary civil litigation, it still does not follow that Congress intended to preclude the filing of Rule 60(b) motions.

Res judicata is predicated on an assumption that the judgment given preclusive effect followed a "full and fair" proceeding. *Montana*, 440 U.S. at 153-54. For this reason, Rule 60(b) has always operated as an exception to the res

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[8] In 1963, the Court recognized that district courts had discretion to dismiss successive applications, unless the "ends of justice" required a successive merits review. This decision was based, in part, on the version of § 2244 in effect at that time, which permitted a judge to dismiss a successive application only when "satisfied that the ends of justice will not be served by such inquiry." *Sanders*, 373 U.S. at 12. *Kuhlmann* was decided in 1986, after passage of the 1966 amendments to § 2244(b), which preserved discretion to entertain successive petitions but eliminated the "ends of justice" inquiry. 477 U.S. at 451. *Kuhlman* preserved the "ends of justice" standard, but narrowed the standard by limiting it to petitioners who could supplement their constitutional claims with a colorable showing of factual innocence. *Id.* at 454.

judicata bar on successive litigation. *See Arizona v. California*, 460 U.S. 605, 619 (1983) ("It is clear that res judicata and collateral estoppel do not apply if a party moves the rendering court in the same proceeding to correct or modify its judgment."). "Rule 60(b) is . . . reserved for those cases of 'injustices which, in certain instances are deemed sufficiently gross to demand a departure' from the rigid adherence to the doctrine of res judicata." *Beggerly*, 524 U.S. at 46 (quoting *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238, 244 (1944)). As a result, the fact that habeas jurisprudence has moved toward greater finality does not mean that Congress intended to displace a well-settled exception to the principle of res judicata.

B.

Allowing Rule 60(b) relief will not circumvent the restrictions in AEDPA and the Court has an obligation to adopt the interpretation that preserves Rule 60(b) to the greatest extent

The above discussion demonstrates that neither the plain language, legislative history, meaning of the terms as understood in the context of pre-existing law, or even broad purpose of AEDPA evidence an irreconcilable conflict with Rule 60. If, however, this Court does find some indication of inconsistency between AEDPA and Rule 60(b), the Court has an obligation to reconcile the provisions before finding any repeal. "[W]hen two statutes are capable of co-existence, it is the duty of the courts . . . to regard each as effective." *Radzanower*, 426 U.S. at 155 (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)). The Court should construe the later act as a continuation of, not substitute for, the first, *see Posadas*, 296 U.S. at 503, and any repeal should be implied "only to the minimum extent necessary." *Radzanower*, 426 U.S. at 155.

The Eleventh Circuit feared that unbridled application of Rule 60(b) "would effectively erase from the books the more recent and more specific statutory requirement" contained in AEDPA. *Gonzalez*, 366 F.3d at 1271. The court contended that "[t]he discretion to reopen

final judgments contemplated in most of the provisions of Rule 60(b) cannot co-exist in a habeas case with § 2244(b)." *Id.* at 1271. This contention, however, was predicated on a misunderstanding of the scope of Rule 60(b). The analysis below demonstrates that preserving full Rule 60(b) relief will not, in fact, conflict with the prohibition against successive applications.

1.

Rule 60(b) retains a distinct scope that does not overlap or conflict with § 2244

Rule 60(b) and AEDPA can co-exist consistently because, as recognized by lower courts, a Rule 60(b) motion seeks different relief based on different grounds than a successive habeas petition. *See Abdur'Rahman*, 392 F.3d at 179 ("[T]he significant functional differences between Rule 60(b) motions and habeas petitions . . . mean that many Rule 60(b) motions will not run afoul of AEDPA.").

First, the immediate objective of a Rule 60(b) motion is not to secure release from detention but "merely [to] reinstate[] the previously dismissed habeas petition, opening the way for further proceedings." *See id.*, 392 F.3d at 179; *Rodriguez*, 252 F.3d at 198. Rule 60(b) motions suggest to a federal court that its earlier judgment rests on a defective foundation, *see Abdur'Rahman*, 392 F.2d at 179, but granting that motion will not, by itself, invalidate the underlying conviction and/or sentence. *Id.* at 180.

Second, and more important, permissible grounds for a Rule 60(b) motion are distinct from the grounds raised in any petition for habeas corpus relief, whether original or successive. A habeas petition asserts that a prisoner is "in custody in violation of the Constitution or laws or treaties of the United States," 28 U.S.C. § 2254(a), as a result of federal constitutional defects that occurred in the state criminal process. *See id.*, 392 F.3d at 179-80; *Rodwell*, 324 F.3d at 70; *Rodriguez*, 252 F.3d at 199. A second or successive habeas petition thus seeks to relitigate previously resolved constitutional claims in an effort to demonstrate for the second time that the petitioner's detention is illegal.

In contrast, Rule 60(b) motions raise issues that have no basis in the Constitution of the United States and that "may well have nothing to do with the alleged violations of federal rights." *Rodriguez*, 252 F.3d at 199. The factual predicate of a proper Rule 60(b) motion deals with a procedural defect or irregularity in the manner in which the federal district court initially rejected the petition containing the arguments about constitutional violations at the state trial. *Abdur'Rahman*, 392 F.3d at 181; *Rodwell*, 324 F.3d at 70. The legal predicate of the Rule 60(b) motion is the federal court's interpretation and application of federal procedural statutes and rules. *See Abdur'Rahman*, 537 U.S. at 95-96 (Stevens, J., dissenting from dismissal of writ of certiorari).[9]

A Rule 60(b)(6) motion thus challenges not the constitutionality of the underlying criminal proceedings, but rather the integrity of the federal district court's decision. Rule 60(b)(6) allows courts to reopen judgments for "any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(6). The court of appeals asserted that no part of Rule 60(b) could do "more harm to the finality of judgments" than 60(b)(6)). *Gonzalez*, 366 F.3d at 1271. However, Rule 60(b)(6) does not exist in a vacuum and does not permit review and relief every time a movant asserts that the judgment is wrong. The law is well-settled that Rule 60(b)(6) applies only in truly exceptional or extraordinary circumstances. *See Liljeberg*, 486 U.S. at 863. Mere intervening changes or developments in law, by themselves, rarely will provide sufficiently extraordinary circumstances. *See Agostini v. Felton*, 521 U.S. 203, 239 (1997).

[9] For example, a motion under Rule 60(b)(1) seeking to vacate a judgment because of "mistake, inadvertence, surprise, or excusable neglect" asserts that the respondent engaged in unfair surprise in the federal habeas proceeding by failing to notify the petitioner of the witnesses to be called at the hearing, but says absolutely nothing about unfair surprise in the underlying state criminal trial. *See Rodriguez*, 252 F.3d at 199.

For example, a prisoner whose motion challenges the district court's rejection of his claim of constitutional violation in the state criminal proceeding, on the grounds that the substantive law has changed, has filed a successive application and cannot rely on Rule 60(b). *See Abdur'Rahman*, 392 F.3d at 185. The rule is unavailable because the change does not render erroneous anything about the process by which the district court rejected the petition. *Id.*[10] On the other hand, Rule 60(b)(6) remains the proper vehicle when the change in law reveals that the district court's procedural decision was erroneous and that error deprived the petitioner of any merits review.

Mr. Gonzalez presents an extraordinary circumstance that properly provides the basis for Rule 60(b) relief. The clarification in law in the instant case evidences a defect not in the underlying state proceedings, but in the district court's dismissal of his habeas petition on federal procedural grounds. The district court never reached, considered, or resolved the merits of Mr. Gonzalez's claims that his guilty plea in state court was unconstitutionally unintelligent, unknowing, and involuntary. *Gonzalez*, 366 F.3d at 1261. Rather, the court dismissed the petition as time-barred, on the ground that it had not been filed within AEDPA's one year limitations period. *Id.*; 28 U.S.C. § 2244(d)(1). Subsequently, this Court clarified in *Artuz v. Bennett*, 531 U.S. 4, 8 (2000), that a petition for state collateral relief was

[10] This petitioner could not properly seek 60(b)(6) relief, and his recourse would be to bring a successive habeas petition, characterize the claim as a new claim because of the change in law, and argue for relief on the basis of § 2244(b)(2)(A), which permits the court to consider a new-claim successive petition that relies on a new rule of constitutional law made retroactive.

There may, however, be extraordinary circumstances, in which fundamental justice dictates that certain petitions be revisited subsequent to a change of substantive law, for example, petitions by mentally retarded death row inmates to revisit their habeas claims in light of *Atkins v. Virginia*, 536 U.S. 304 (2002). Courts of appeals will have to decide whether granting 60(b)(6) relief to such movants is an abuse of discretion in light of AEDPA. *See Calderon v. Thompson*, 523 U.S. 538, 554 (1998) (holding that abuse of discretion standard is defined in part by AEDPA).

"properly filed" when it had been delivered and accepted in compliance with state rules. As a result, Mr. Gonzalez's original and only petition was timely filed, and the district court's judgment was plainly incorrect in light of *Artuz*.

Mr. Gonzalez's subsequent Rule 60(b) motion challenged only the district court's purely procedural ruling as to timing. It focused entirely on litigation in the federal district court and that court's resolution of the petition. The Rule 60(b) motion in no way implicated anything that occurred in state court, but instead asserted that the erroneous procedural ruling deprived the federal court's judgment of required integrity. *See Abdur'Rahman*, 392 F.3d at 179; *Rodriguez*, 252 F.3d at 199; *Rodwell*, 324 F.3d at 71. Mr. Gonzalez's case is "exceptional" for purposes of Rule 60(b)(6), not a case of run-of-the-mill legal error, because the district court's erroneous procedural ruling deprives him of any opportunity to obtain federal review of the merits of his claims that his detention is unconstitutional.[11]

As Justice Stevens correctly stated in *Abdur'Rahman*, whether one ultimately agrees that a particular circumstance actually warrants Rule 60(b) relief is separate from whether it is proper for the district court to consider a Rule 60(b) motion in the first instance. 537 U.S. at 97 (Stevens, J., dissenting from dismissal of writ of certiorari). This much, however, is clear: Mr. Gonzalez's situation is the type of extraordinary circumstance "justifying relief from the operation of the judgment" under Rule 60(b)(6) and warranting direct consideration by the district court.

The reasonable interpretation of Rule 60(b) thus establishes consistency between the rule and § 2244(b) such

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[11] Some courts have indicated that even a valid dismissal of an untimely federal habeas petition should not unequivocally bar the petitioner from merits review. *See e.g., Rosa v. Senkowski*, 1997 WL 436484, at *5 (S.D.N.Y. 1997) (holding that strict application of AEDPA's time limits, without a showing of prejudice to the state, violates suspension clause); *cf. Rodriguez v. Artuz*, 990 F. Supp. 275, 281-82 (S.D.N.Y. 1998) (holding that AEDPA's time limits do not violate the suspension clause "per se," but there may be cases in which strict application of time limits is unconstitutional, for example, where petitioner makes a showing of actual innocence).

that both retain effect. This Court must adopt an interpretation that allows the two rules to be read consistently so as to avoid repeal by implication. *See Kremer*, 456 U.S. at 468; *Radzanower*, 426 U.S. at 155. Allowing the petitioner to reopen the judgment (or to argue for the reopening of the judgment) in the instant action does no violence to the dictates or policies of § 2244(b). This type of Rule 60(b) motion is not inconsistent with, much less in irreconcilable conflict with, the restrictions in § 2244(b), making repeal by implication especially unwarranted. *See Crawford Fitting Co.*, 482 U.S. at 442.

2.

The Eleventh Circuit's treatment of Rule 60(b) is not a repeal to the "minimum extent necessary"

The Eleventh Circuit explicitly recognized that some limited portion of Rule 60(b) survived and could be reconciled with AEDPA. The court, however, preserved only 60(b)(3), which provides for relief from judgment due to "fraud . . . misrepresentation, or other misconduct of an adverse party," in habeas cases. *Gonzalez*, 366 F.3d at 1278. The majority held that the "state's interest in the finality of a judgment denying federal habeas corpus relief is not compelling if that judgment would not have been obtained but for fraud that its agents perpetrated upon the federal court." *Id.*

The court, however, never explained why fraud is so different from the rest of 60(b) as to constitute the lone surviving exception. As several lower courts have explained, fraud on the federal court certainly is not the only misconduct enumerated in Rule 60(b) that casts doubt on the legitimacy or integrity of a federal habeas judgment. *See id.* at 1297 (Tjoflat, J., specially concurring in part and dissenting in part); *see also Abdur'Rahman*, 392 F.3d at 180. The state does not have a greater interest in the finality of a federal judgment procured through mistake or surprise or, as here, one procured through an erroneous application of habeas procedures that deprives a state prisoner of any review of the merits of his underlying constitutional claims.

These judgments, like fraudulent judgments, lack integrity or legitimacy.

Because there is no meaningful difference between fraud and any of the other Rule 60(b) grounds, the Eleventh Circuit's virtual evisceration of 60(b), preserving only the fraud ground, was not a repeal to the "minimum [extent] necessary" required by *Radzanower,* 426 U.S. at 155. Saving only 60(b)(3), but finding the remainder of the rule repealed, is not the narrowest repeal possible to avoid a conflict. Rule 60(b) as a whole, and not just the fraud provision, survives without interfering with § 2244(b) or even AEDPA's broad policies. Thus, to avoid effecting an unjustified repeal by implication, this Court must preserve far more of Rule 60(b), including the 60(b)(6) grounds at issue in the instant case.

C.

AEDPA's limitations on successive habeas applications do not evidence congressional intent to displace a court's traditional equitable power to modify its judgments

One of the basic equitable powers of a court is the ability to modify its own judgments in extraordinary circumstances. *See Plaut*, 514 U.S. at 233. Rule 60(b) codified this equitable authority and clarified and expanded the circumstances in which it could be invoked. *See Bankers Mortgage Co. v. United States*, 423 F.2d 73, 77 (5th Cir. 1970) ("60(b) is a response to the plaintive cries of parties who have for centuries floundered, and often succumbed, among the snares and pitfalls of the ancillary common law and equitable remedies. It is designed to remove the uncertainties and historical limitations of the ancient remedies but to preserve all of the various kinds of relief which they offered."). The rule "reflects and confirms the courts' own inherent and discretionary power, 'firmly established in English practice long before the foundation of our Republic, to set aside a judgment whose enforcement would work inequity.'" *Plaut*, 514 U.S. at 233-24 (quoting *Hazel-Atlas Glass Co.*, 322 U.S. at 244). Consequently, a finding that § 2244(b)(1) supplants Rule 60(b) assumes not

only that Congress intended to impliedly repeal a codified rule, but also that Congress intended to displace the equitable power of a court to grant relief from its erroneous.

"Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. 'The great principles of equity, securing complete justice, should not be yielded to light inferences or doubtful construction.'" *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) (quoting *Brown v. Swann*, 35 U.S. (10 Pet.) 497, 503 (1836)). This Court does "not assume lightly that Congress has intended to depart from established [equitable] principles." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982). A statute must be construed "in favor of that interpretation which affords a full opportunity" for courts to exercise their traditional equity. *Hecht Co. v. Bowles,* 321 U.S. 321, 330 (1944).

AEDPA clearly does not, nor was it intended to, displace all of a court's common law or equitable authority. In *Felker*, 518 U.S. at 660-61, this Court demanded of Congress an explicit reference to its jurisdiction over original habeas petitions before it would conclude that AEDPA repealed that authority. The Court emphasized that other provisions of AEDPA expressly limited the Court's appellate jurisdiction over a court of appeals' denial of leave to file a second or successive petition or expressly amended procedural rules. *Id.* at 661 n.3. Finding no similar explicit reference to its original habeas jurisdiction, the Court held that it had not been limited.

When a statute has not "foreclosed the exercise of equitable discretion," as in the instant case, "the proper standard for appellate review is whether the District Court abused its discretion" in the exercise of its equitable powers. *Weinberger*, 456 U.S. at 320. In *Calderon v. Thompson*, 523 U.S. 538, 541-42 (1998), a case heavily relied on by the court below, this Court found that the Ninth Circuit had abused its discretion by recalling its earlier mandate denying habeas relief. The Eleventh Circuit's insistence that *Calderon* supports the position that AEDPA is meant to limit the review of Rule 60(b) motions, *see Gonzalez*, 366 F.3d at

1280-81, is simply misplaced. In *Calderon*, this Court held that courts of appeals maintained the equitable discretion to recall mandates, notwithstanding AEDPA. *Calderon*, 523 U.S. at 554. The Court nonetheless found that the Ninth Circuit had abused its discretion in recalling its mandate to "revisit the merits of its earlier decision denying habeas relief," because such duplicative merits review was not required by the ends of justice. *Id.* at 558-59.

Calderon in no way supports the proposition that district courts do not retain the equitable power to grant Rule 60(b) relief in extraordinary circumstances demonstrating that the district court judgment lacked integrity. As with the recall of the mandate at issue in *Calderon*, a district court's decision regarding a Rule 60(b) motion can be reviewed for abuse of discretion. *See Weinberger*, 456 U.S. at 320. The fact that, in *Calderon*, the Ninth Circuit abused its discretion in recalling a mandate in no way logically dictates that district courts do not retain discretion to review Rule 60(b) motions. Moreover, this Court limited its finding of abuse of discretion to the specific circumstances of the case.[12]

Conceivably, a district court could abuse its discretion by granting a Rule 60(b) motion without finding that one of the six predicates exist or solely to revisit its earlier merits decision. The fact, however, that a judge can abuse his discretion in granting equitable relief does not compel the conclusion that no judge should be able to exercise equitable power. Consequently, in the absence of

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[12] The Court stated:

> We should be clear about the circumstances we address in this case. We deal not with the recall of a mandate to correct mere clerical errors in the judgment itself, similar to those described in Federal Rule of Criminal Procedure 36 or Federal rule of Civil Procedure 60(a). The State can have little interest, based on reliance or other grounds, in preserving a mandate not in accordance with the actual decision rendered by the court. This is also not a case of fraud upon the court, calling into question the very legitimacy of the judgment.

Calderon, 523 U.S. at 557 (citations omitted).

any language evidencing congressional intent to displace a court's ability to equitably review its own judgments, district courts retain the power to entertain Rule 60(b) motions, subject to abuse-of-discretion review.

II.
THIS COURT SHOULD INTERPRET AEDPA AND RULE 60 CONSISTENTLY TO AVOID A CONSTRUCTION THAT RAISES GRAVE CONSTITUTIONAL CONCERNS

"It is well settled that this Court will not pass on the constitutionality of an Act of Congress if a construction of the statute is fairly possible by which the question may be avoided." *United States v. Clark*, 445 U.S. 23, 27 (1980); *see also New York City Transit Auth. v. Beazer*, 440 U.S. 568, 582 & n.22 (1979). This canon "rest[s] on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Suarez Martinez*, 125 S. Ct. 716, 724 (2005). "It is not a method of adjudicating constitutional questions;" rather "it allows courts to *avoid* the decision of constitutional questions." *Id.* (emphasis in original). Avoiding constitutional problems is especially important when considering a purported repeal by implication. *See St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 788 (1981) ("Th[e] long-established canon of construction [against implied repeals] carries special weight when an implied repeal or amendment might raise constitutional questions.").

A.
Interpreting AEDPA as prohibiting Rule 60(b) relief raises grave concerns over unconstitutional suspension of the writ

Article I, § 9 of the United States Constitution states, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." *See also Rasul v. Bush*, 124 S. Ct. 2686, 2692 (2004). "[A]bsent suspension, the writ of habeas corpus remains available to every individual within the United States." *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2644 (2004).[13] "This Court has constantly emphasized the fundamental importance of the writ of habeas corpus in our constitutional scheme . . . The Court has steadfastly insisted that 'there is no higher duty than to maintain it unimpaired.'" *Johnson v. Avery*, 393 U.S. 483, 485 (1969). "[T]he writ 'has been for centuries esteemed the best and only sufficient defence of personal freedom.'" *Lonchar*, 517 U.S. at 324 (quoting *Ex parte Yerger*, 8 Wall. 85, 95 (1869)).[14]

This Court has previously addressed the constitutionality of AEDPA's new filing rules in a very general manner. In *Felker*, 518 U.S. at 664, the Court ruled that "[t]he added restrictions which the Act places on second habeas petitions are well within the compass of th[e] evolutionary process [of filing restrictions], and we hold that they do not amount to a 'suspension' of the writ contrary to Article I, § 9." *Id.* at 664. *Felker* assumes that prior to AEDPA, habeas filing restrictions were not so broad as to

[13] "Only in the rarest circumstances has Congress seen fit to suspend the writ. *See, e.g.*, Act of Mar. 3, 1863, ch. 81, § 1, 12 Stat. 755, Act of April 20, 1871, ch. 22, § 4, 17 Stat. 14. At all other times, it has remained a critical check on the Executive, ensuring that it does not detain individuals except in accordance with law." *Hamdi*, 124 S. Ct. at 2644 (2004).

[14] There has been some debate regarding the extent of Suspension Clause protection, given that during the Framers' time the writ was extremely limited. *See* Hertz & Liebman, *Federal Habeas Corpus Practice and Procedure*, § 7.2d, at 341 (4th ed. 2001). This Court has declined to interpret the Clause as only applying to the writ of the Framers' era. *See Felker*, 518 U.S. at 663-64 (assuming that "the Suspension Clause of the Constitution refers to the writ as it exists today"); *Swain v. Pressley*, 430 U.S. 372, 380-81 (1977) (rejecting that Suspension Clause "merely prohibits suspension of the writ as it was being used when the Constitution was adopted").

unconstitutionally suspend the writ. Whether the Eleventh Circuit's interpretation of § 2244(b)(1) renders the provision unconstitutional thus depends on whether it represents a departure from the evolution of filing restrictions. For many reasons, including those discussed in Part I *supra*, the court of appeals' approach represents a gross departure from the pre-AEDPA evolutionary process.

The evolving restrictions on habeas filings were limited by the principle that petitioners are entitled to at least one federal review of the merits of their constitutional claims. This Court has held that the test for suspension is whether the petitioner was denied an adequate and effective collateral vehicle to test the legality of his detention. *Swain v. Pressley*, 430 U.S. 372, 381 (1977). The Suspension Clause thus generally guarantees that a habeas petitioner will receive one full and fair review of the merits of his habeas corpus claims. *See Sanders*, 373 U.S. at 16-17 (holding that petitioner is guaranteed one "full and fair" merits review); *Rodriguez v. Artuz*, 990 F. Supp. 275, 282-83 (S.D.N.Y. 1998) ("[T]he guarantee against 'suspension' ... obligates Congress to provide one meaningful, nondiscretionary opportunity to secure federal review of federal claims.") (internal quotations omitted). This Court has held that "[d]ismissal of a first habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to the important interest in human liberty." *Lonchar*, 517 U.S. at 324.

Although petitioners are generally guaranteed one valid merits review, this Court has acknowledged that there are certain petitioners who may be prevented from obtaining a merits review without offending the Suspension Clause. Waiver and state comity concerns moved this Court to hold that petitioners who procedurally default or who raise new claims in a second petition could be barred from merits review. Nonetheless, to prevent this bar from constituting unconstitutional suspension, the Court preserved merits review for those who could show cause and prejudice or actual innocence. *See Murray*, 477 U.S. at 496; *Francis v. Henderson*, 425 U.S. 536, 542 (1976). Thus, even though such litigants were culpable in their failure to follow state

rules or to raise ripe claims and that failure adversely affected the state's interest, fundamental justice dictated that they still could retain some avenues toward merits review. *See Engle*, 456 U.S. at 134 ("In appropriate cases th[e] principles of [finality and comity] must yield to the imperative of correcting a fundamentally unjust incarceration. [W]e are confident that victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard.").

Although certain culpable behavior on the part of a petitioner could disentitle him to a merits review, this Court has recognized that not all culpable behavior allows a court to deny the right to a valid merits review. In *Martinez-Villareal*, the Court declined to interpret AEDPA as preventing a petitioner whose initial *Ford* claim was dismissed as premature from obtaining merits review, holding that "the implications [of such an interpretation] for habeas practice would be far reaching and seemingly perverse." 523 U.S. at 644. This Court also indicated that federal habeas petitioners are entitled to a merits review even when their initial petitions have been dismissed for failure to exhaust state remedies, *see id.*; *Slack*, 529 U.S. at 487, or failure to pay filing fees. *See Martinez-Villareal*, 523 U.S. at 645 (citing *United States ex rel. Barnes v. Gilmore*, 968 F. Supp. 384, 385 (N.D. Ill. 1997); *Marsh v. United States Dist. Ct.*, 1995 WL 23942 (N.D. Cal., Jan. 9, 1995); *Taylor v. Mendoza*, 1994 WL 698493 (N.D. Ill., Dec. 12, 1994)). Although one could say that such petitioners were at fault for failing to adhere to procedural rules, this Court held that such faults were not grave enough to disentitle petitioners to merits review, because "[t]o hold otherwise would mean that a dismissal of a first habeas petition for technical procedural reasons would bar the prisoner from ever obtaining review." *Martinez-Villareal*, 523 U.S. at 645.

It is thus clear from the evolution of filing restrictions that the only petitioners who may be denied merits review are those whose culpable fault is so grave as to constitute waiver or implicate state comity concerns. Even these individuals, however, are permitted merits review upon a showing of cause and prejudice. *See Murray*, 477 U.S. at

496; *Francis*, 425 U.S. at 542. Mr. Gonzalez was undoubtedly denied a review on the merits of his constitutional claims, but he followed all the applicable rules in filing his federal habeas petition. It was court error, not Mr. Gonzalez's default or waiver, which prevented the merits decision. Because Mr. Gonzalez did nothing wrong when he filed his first habeas petition, he not only engaged in less culpable conduct that those who procedurally default or abuse the writ, he also engaged in less culpable conduct than a person whose initial petition was dismissed for failure to exhaust or pay a filing fee. Thus, the Eleventh Circuit's interpretation of AEDPA as precluding a faultless 60(b) movant from obtaining a first merits review is a serious departure from the evolution of filing restrictions. *See Felker*, 518 U.S. at 664.

Consequently, the Suspension Clause's guarantee of one valid merits review, combined with the narrow circumstances in which that merits review can be denied, demonstrates that the Eleventh Circuit's construction of § 2244(b)(1) as precluding Rule 60(b) relief should be rejected because it raises grave constitutional concerns.

B.

Interpreting AEDPA as prohibiting Rule 60(b) relief raises grave concerns over denial of due process of law

The Eleventh Circuit's interpretation of AEDPA as preventing a state prisoner from invoking Rule 60(b) raises the serious risk of a Due Process violation in contravention of the Fifth Amendment to the United States Constitution. The statutory right of habeas corpus[15] is protected by the due process guarantees. *See Bonin v. Vasquez*, 999 F.2d 425, 430 (9th Cir. 1993) (holding that procedural due process applies in federal habeas proceedings); *see also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985) (holding that statutory rights involving life, liberty, or property are

[15] Arguably, the right to habeas corpus review is not merely statutory, but also stems from the Constitution's Suspension Clause.

subject to the Due Process Clause). Therefore, a state prisoner's petition for habeas relief must be resolved according to procedures that are fundamentally fair and specifically tailored to protect the prisoner from an erroneous deprivation of such right. *See e.g. Addington v. Texas*, 441 U.S. 418, 425 (1979) (holding that the "function of legal process is to minimize the risk of erroneous decisions"); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 161 (1951) (Frankfurter, J., concurring) (stating that "fairness of procedure is due process in its primary sense") (internal citations omitted).

In *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), this Court established that the process a litigant is due depends on a balancing of three factors: (1) the private interest affected by the official action; (2) the risk of erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requirements would entail.

It is clear that, at a minimum, absent procedural default or waiver, a habeas petitioner has a statutory right to one valid review of the merits of his claims. *See Lonchar*, 517 U.S. 324, and discussion *supra*. Because merits review is at the heart of the statutory interest, the procedures established to govern habeas litigation must guarantee the petitioner a fair opportunity for at least one valid consideration of the merits of his claims. *See Anti-Fascist Comm.*, 341 U.S. at 161 (Frankfurter, J., concurring) (finding that "a state may not deprive a person of all existing remedies for the enforcement of a right . . . unless there is, or was, afforded to him some real opportunity to protect it").

Merits review cannot be protected, however, in the absence of a procedural mechanism to reopen a judgment in the extraordinary circumstance where court error has prevented merits review. *See Paterno v. Lyons*, 334 U.S. 314, 319 (1948) (finding that due process entails "an opportunity to effectively take advantage of . . . corrective remedies"); *Mooney v. Holohan*, 294 U.S. 103, 112-13

(1935) (finding that due process is violated when no "corrective judicial process" is available to challenge an erroneous court judgment). The absence of such a procedural mechanism results in the unfair and irremediable dismissal of claims for erroneous reasons having nothing to do with the underlying merits, even though the petitioner fully complied with procedural requirements. Consequently, precluding Rule 60(b) places habeas petitioners at great risk of erroneous deprivation of their statutory right to challenge illegal detentions.

Turning to the government's interest, while the state and society have a strong interest in the finality of criminal convictions, *see Murray*, 477 U.S. at 487, this does not mean that the federal government has an overriding interest in preserving erroneous federal habeas judgments. *See Calderon*, 523 U.S. at 557 (stating that government "can have little interest" in a faulty judgment). Moreover, because a Rule 60(b) motion does not seek to relitigate the substantive constitutional issues, it imposes minimal burdens on the district court and thus affects finality very little. *See Abdur'Rahman*, 537 U.S. at 598 (Stevens, J., dissenting from dismissal of writ of certiorari) (asserting that Rule 60(b) review only requires a court to determine whether a predicate for reopening judgment exists). In addition, the State's interest in comity and in ensuring that its procedural rules are not subverted by federal law, *see Murray*, 477 U.S. at 487, is not adversely affected by Rule 60(b) review. Rule 60(b) will not help a petitioner who has procedurally defaulted in state court; the rule in no way affects the state's ability to set procedure free from federal interference. Consequently, permitting a habeas litigant to make a motion under Rule 60(b) does not constitute an "additional" or "substitute" procedure that imposes an unreasonable administrative burden or cost on the state or federal government.

The Eleventh Circuit's narrow construction of Rule 60(b) does not strike the proper balance of interests because it eliminates the ability of habeas petitioners such as Mr. Gonzalez to challenge faulty district court decisions that prevent them from obtaining a merits review. The lower court's construction thus risks the erroneous deprivation of

the statutory right to challenge the legality of detention. When balanced against the government's *de minimus*, if not non-existent, interest in preserving defective district court judgments to minimally increase efficiency and finality, it becomes clear that denial of Rule 60(b) review falls well short of the process due to habeas litigants. Because the Eleventh Circuit's interpretation of AEDPA raises the specter of constitutional due process problems, it must be rejected.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Eleventh Circuit should be reversed.

Respectfully Submitted,

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